



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

Mr. Wayne Scott
Executive Director
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

Letter Opinion No. 98-047

Re: Whether Texas Department of Criminal Justice may adopt policy of mandatory tuberculosis screening of all employees and volunteers (RQ-1043)

Dear Mr. Scott:

You ask whether the Texas Department of Criminal Justice ("TDCJ") may adopt a policy of mandatory tuberculosis screening of all TDCJ employees and volunteers under the authority of section 501.060 of the Government Code. We conclude that section 501.060 authorizes mandatory tuberculosis screening of TDCJ employees subject to constitutional prohibitions against unreasonable searches and seizures.

Tuberculosis is a disease caused by bacteria called *mycobacterium tuberculosis* that usually attack the lungs. It is spread through the air from one person to another, often when an infected person coughs or sneezes.¹ Section 501.060 of the Government Code is designed to prevent the spread of tuberculosis in state prisons. It reads as follows:

(a) The board will establish requirements for tuberculosis screening of department employees and volunteers in a manner similar to that established for jail employees and volunteers as outlined in Subchapter B, Chapter 89, Health and Safety Code.

(b) The institutional division [of TDCJ] shall provide tuberculosis screening for a person if:

(1) the person is an employee of:

(A) the institutional division;

(B) the correctional managed care plan operated by The University of Texas Medical Branch at Galveston; or

¹U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, Frequently Asked Questions (1994), <<http://www.cdc.gov/nchstp/tb/faq.htm#R1FToC2>>.

(C) the Texas Tech University Health Science Center Correctional Managed Care Plan; and

(2) the person requests the screening.²

Subsection (a) was adopted by the legislature in 1993 as part of a bill requiring tuberculosis screening of county jail and community corrections facility inmates, employees, and volunteers.³ It requires the Texas Board of Criminal Justice to establish requirements for tuberculosis screening of TDCJ employees and volunteers, and relies on chapter 89, subchapter B, Health and Safety Code, for the manner similar to which TDCJ requirements must be established. Chapter 89 of the Health and Safety Code requires “each employee or volunteer working or providing services in a jail or a community corrections facility, who meets the screening guidelines prescribed by [Texas Board of Health] rule,” to obtain a certificate signed by a physician stating that the employee or volunteer was tested for tuberculosis and tested negative.⁴ If an employee or volunteer tests positive for tuberculosis and is determined to have tuberculosis, the person may not begin or continue work until the person is treated and becomes noninfectious.⁵ Chapter 89 directs the Board of Health to recommend to TDCJ and the Texas Commission on Jail Standards rules for carrying out the chapter, including the categories of employees and volunteers to be screened, the type of tests to be used, and the frequency of screening tests.⁶

Chapter 89, subchapter B, requires the expense of a tuberculosis screening test to be borne by the employee or volunteer unless the commissioners court, the governing body of a municipality, or a local health department or public health district elects to provide the service.⁷ In other words, under chapter 89 employees and volunteers are tested not by the jail or facility but by a physician of their choice, at their own cost, unless the jail or facility or a local health authority elects to provide testing.

²Gov't Code § 501.060.

³Act of May 28, 1993, 73d Leg., R.S., ch. 786, § 2, 1993 Tex. Gen. Laws 3064, 3067 (then codified at Gov't Code § 501.059).

⁴Health & Safety Code § 89.011.

⁵*Id.* § 89.012.

⁶*Id.* § 89.072. The Texas Commission on Jail Standards' rule for tuberculosis screening plans in jails and community corrections facilities requires plans to be developed and implemented in accordance with chapter 89 of the Health and Safety Code and with Texas Department of Health rules on tuberculosis screening. 37 T.A.C. § 273.6.

⁷Health & Safety Code § 89.014.

While subsection (a) of section 501.060 requires testing of employees and volunteers of TDCJ generally, subsection (b) applies only to employees of the institutional division of TDCJ.⁸ The institutional division operates and manages the state prison system.⁹ Subsection (b) was added in 1995 to address concerns raised by institutional division employees, particularly health care providers, who have regular close contact with inmates.¹⁰ Employees who wished to be tested, usually after exposure to an infected inmate, had to go to their own physicians and bear the cost of the test themselves or as part of their health insurance coverage because TDCJ had no free testing program in place for employees.¹¹ Because TDCJ already provided testing of inmates, supporters of the bill argued that the same testing should be made available to employees.¹² Thus subsection (b) was added to require TDCJ to provide screening to institutional division employees who request it.

Your question arises because you see a conflict between subsections (a) and (b) of section 501.060. Since subsection (b) permits screening only of institutional division employees, and then only upon request, in your view TDCJ cannot require screening of TDCJ employees and volunteers generally, even though subsection (a) appears to allow it. We believe the two provisions can be harmonized. Subsection (a) requires the department to screen TDCJ employees and volunteers generally. The agency may rely on the analogous authority set out in chapter 89 to determine which employees are to be screened.¹³ Also relying on chapter 89, TDCJ may elect to provide the screening itself, or it may require the cost of the screening to be borne by the employee or

⁸Subsection (b) also applies to employees of "the correctional managed care plan operated by The University of Texas Medical Branch at Galveston" and "the Texas Tech University Health Science Center Correctional Managed Care Plan." Gov't Code § 501.060(b). Because you do not ask about employees of these entities, we do not discuss them in this opinion.

⁹Gov't Code § 493.004.

¹⁰See House Comm. on Corrections, Bill Analysis, H.B. 1696, 74th Leg. (1995); Hearings on H.B. 1696 Before the House Comm. on Corrections, 74th Leg. (Mar. 28, 1995) (tape available from House Video/Audio Committee Services); House Research Organization, Bill Analysis, H.B. 1696, 74th Leg. (Apr. 20, 1995).

¹¹See Hearings on H.B. 1696 Before the House Comm. on Corrections, 74th Leg. (Mar. 28, 1995) (tape available from House Video/Audio Committee Services). According to a bill analysis prepared by the House Research Organization:

TDCJ has developed policies and procedures for providing the tests for employees, but it has not implemented a program due to lack of funding. Current law requires employees and volunteers to pay for the test unless provided by employers or a public health department. This bill would require the institutional division to provide screening for employees who request it.

House Research Organization, Bill Analysis, H.B. 1696, 74th Leg. (Apr. 20, 1995).

¹²House Research Organization, Bill Analysis, H.B. 1696, 74th Leg. (Apr. 20, 1995).

¹³Health & Safety Code §§ 89.001, .072.

volunteer.¹⁴ Subsection (b), on the other hand, requires the department to provide screening to employees of the institutional division, upon request, at no cost to the employee. While institutional division employees may fall within the screening requirements of subsection (a) applicable to TDCJ employees generally, and thus be subject to the mandatory screening that employees may or may not have to pay for themselves, under subsection (b) institutional division employees may request and receive screening by TDCJ at no cost to them.

Although section 501.060(a) on its face does not prohibit tuberculosis screening of all TDCJ employees, TDCJ's authority to screen employees is limited by the Fourth Amendment to the United States Constitution and article I, section 9 of the Texas Constitution, both of which protect persons from unreasonable searches and seizures by government officials where the search or seizure infringes upon a reasonable expectation of privacy. Because individuals have a reasonable expectation of privacy in the personal information their bodily fluids and tissues contain, a mandatory medical testing policy constitutes a search and seizure for constitutional purposes.¹⁵ In determining whether a testing policy is a reasonable intrusion, a court would balance the nature and type of the intrusion against the importance of the governmental interests alleged to justify the intrusion. For example, in *Glover v. Eastern Nebraska Community Office of Retardation*,¹⁶ the court found unconstitutional a mandatory AIDS and hepatitis blood testing policy for employees of a health care provider where the facts showed that the employees' risk of transmitting the diseases to clients was extremely low. Conversely, in *Conlon v. Marshall*,¹⁷ a New York court upheld a board of health rule requiring school teachers and employees who came in contact with students to have a chest x-ray examination for tuberculosis. The court ruled that no constitutional rights were unreasonably infringed, stating that "[w]here, as here, the choice must be made between the individual rights of the teacher, on the one hand, and the health of school children generally, on the other, . . . the teacher's rights must yield to the common good."¹⁸

In this case, a court would weigh the nature of the tuberculosis testing of TDCJ employees¹⁹ against the state's interest in preventing the occurrence and spread of tuberculosis in state prison populations. This evaluation must be made with respect to each type of the approximately 42,000

¹⁴*Id.* § 89.014.

¹⁵See *Glover v. Eastern Nebraska Community Office of Retardation*, 686 F. Supp. 243, 250 (D. Neb. 1988), *aff'd*, 867 F.2d 461 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 321.

¹⁶*Id.*

¹⁷59 N.Y.S.2d 52 (N.Y. Sup. Ct. 1945).

¹⁸*Id.* at 56.

¹⁹A tuberculosis screening test is performed by injecting a small amount of testing fluid just below the skin on a person's arm. The skin's reaction to the fluid indicates the presence or absence of tuberculosis infection.

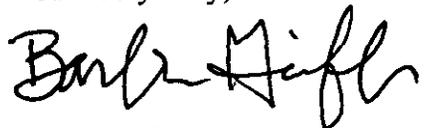
TDCJ employees throughout the state,²⁰ many of whom may not routinely come into contact with the inmate population. For example, tuberculosis testing might be reasonable for TDCJ guards working in state prisons, where studies have shown a high incidence of tuberculosis, but not for administrative staff working in TDCJ's Austin office who may have little or no contact with prison inmates or personnel. Chapter 89 of the Health and Safety Code, upon which TDCJ may model its policy, limits tuberculosis testing to jail and community corrections facility employees "working or providing services in a jail or a community corrections facility who meet[] the screening guidelines prescribed by [Texas Board of Health] rule."²¹ Department of Health rules adopted under the authority of chapter 89 for jails and other correctional facilities require screening of employees "who share the same air with inmates."²² Thus chapter 89 provides a mechanism by which it may be determined which employees it is reasonable to test in order to serve the purpose of the screening requirement. Likewise, TDCJ must determine in the first instance which employees and volunteers it is reasonable to test.

In sum, we conclude that the Texas Department of Criminal Justice may adopt a policy of mandatory tuberculosis screening for employees and volunteers pursuant to Government Code section 501.060, subject to constitutional prohibitions against unreasonable searches and seizures.

S U M M A R Y

The Texas Department of Criminal Justice may adopt a policy of mandatory tuberculosis screening of department employees and volunteers pursuant to section 501.060(a) of the Government Code, subject to constitutional prohibitions against unreasonable searches and seizures.

Yours very truly,



Barbara Griffin
Assistant Attorney General
Opinion Committee

²⁰Texas Department of Criminal Justice, Annual Report for 1995, <<http://www.tdcj.state.tx.us/tdcj1995.htm>>.

²¹Health & Safety Code § 89.011.

²²25 T.A.C. § 97.173(4).